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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/905,540	07/13/2001	Michael Dean McCutchan	8169M	3927

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EXAMINER

BECKER, DREW E

ART UNIT	PAPER NUMBER
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1761

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Please find below and/or attached an Office communication concerning this application or proceeding.



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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/905,540
Filing Date: July 13, 2001
Appellant(s): MCCUTCHAN, MICHAEL DEAN

S. Robert Chuey
For Appellant

EXAMINER'S ANSWER

MAILED
AUG 31 2005
GROUP 1700

This is in response to the appeal brief filed June 9, 2005 appealing from the Office action mailed January 7, 2005.

S.d.d

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The following are the related appeals, interferences, and judicial proceedings known to the examiner which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal:

Patent application 09/850,894 by the same assignee.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

This appeal involves claims 1, 3, 5-6, and 17-20.

Claims 2, 4, and 7-16 have been canceled.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

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The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct. The changes are as follows: the rejections based upon Pringles in view of Snack-a-Dip and Bezek et al, as well as Snack-a-Dip in view of Bezek et al and Doritos have been lifted in order to simplify the number of issues before the Board.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

US 2002/0122852A1

Zimmerman et al

9-2002

Snack-a-Dip, Lightly salted tortilla chips & salsa, Combi-pack 2-in-1, ASB Group

(France), acquired by appellant prior to July 13, 2000, sample held in examiner's office.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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2. Claims 1, 3, 5-6 and 17-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Zimmerman et al [US 2002/0122852A1] in view of Snack-a-Dip. Zimmerman et al teach a kit comprising triangular chips having a length of 110 mm and a width of 110 mm which produces an area of about 6000 mm² (page 5, paragraph 0048), a packed bulk density of 0.1-0.35 g/cm³ (page 10, claim 14), a triangular canister having a sidewall, bottom wall, and top opening (Figure 7), and the chips being nested (page 10, claim 2). Zimmerman et al do not recite a tub with dip (claims 1 & 17), a snack piece to dip ratio of less than about 2 (claims 3 & 17), and a removable lid (claim 19). Snack-a-Dip teaches a kit comprising a canister containing a plurality of snack pieces, an attached tub containing a dip condiment (see sample), a snack piece to dip ratio of 1.5 (Table 1, page 6 of appellant's specification), and a removable lid (see sample). It would have been obvious to one of ordinary skill in the art to incorporate the tub of dip and the lid of Snack-a-Dip into the kit of Zimmerman et al since both are directed to chip containers, since the chips of Zimmerman et al were commonly eaten with dip, since it was commonly known and practiced to provide a tub of dip within the chip canister as shown by Snack-a-Dip (see sample), since the removable lid of Snack-a-Dip would have provided an effective means for sealing the container of Zimmerman et al, since the dip ratio of Snack-a-Dip would have provided an appropriate amount of dip for the chips, and since providing dip along with the chips of Zimmerman et al would have provided added convenience to the consumer by eliminating the need to purchase and transport a separate tub of dip.

(10) Response to Argument

Appellant argues that there is no suggestion to combine the references. The examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Zimmerman et al is directed to a snack chip canister, and Snack-a-Dip is directed to a snack chip canister with a tub of dip. It would have been obvious to one of ordinary skill in the art to incorporate the tub of dip and the lid of Snack-a-Dip into the kit of Zimmerman et al since the chips of Zimmerman et al were commonly eaten with dip, since it was commonly known and practiced to provide a tub of dip within the chip canister as shown by Snack-a-Dip (see sample), since the dip ratio of Snack-a-Dip would have provided an appropriate amount of dip for the chips, and since providing dip along with the chips of Zimmerman et al would have provided added convenience to the consumer by eliminating the need to purchase and transport a separate tub of dip.

In response to appellant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does

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not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Appellant argues that the examiner relied upon personal knowledge, and therefore should have applied "Judicial Notice". However, the motivation cited by the examiner was common sense to the ordinary person in the street, let alone one of ordinary skill in the art at the time of the invention.

Appellant argues that because the references do not explicitly mention one another, that there would be no motivation to combine them. However, the motivation can be found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, one of ordinary skill in the art would have combined the references because the chips of Zimmerman et al were commonly eaten with dip, because it was commonly known and practiced to provide a tub of dip within the chip canister as shown by Snack-a-Dip (see sample), because the dip ratio of Snack-a-Dip would have provided an appropriate amount of dip for the chips, and because providing dip along with the chips of Zimmerman et al would have provided added convenience to the consumer by eliminating the need to purchase and transport a separate tub of dip.

Appellant argues that Zimmerman et al do not teach the claimed surface area and space efficiency. However, Zimmerman et al clearly teach triangular chips having a length of 110 mm and a width of 110 mm which produces an area of about 6000 mm²

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(page 5, paragraph 0048) and a packed bulk density of 0.1-0.35 g/cm³ (page 10, claim 14). It is quite clear from reading Zimmerman et al that the packed bulk density is the same property as appellant's "space efficiency" as defined in applicant's specification (page 1, line 25).

Appellant argues that the examiner haphazardly measured chips and applied references. However, the rejection of the claims based upon Zimmermann et al, in view of Snack-a-Dip, is extremely simple and easy to understand. The examiner did not measure any chips, because Zimmermann et al disclosed their size in writing (page 5, paragraph 0048)

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,


Drew Becker



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8-29-05

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